ORIGINAL

(2)

No. 96-6298

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, WARDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATE COURTS OF APPEALS
FOR THE SEVENTH CIRCUIT

JAMES S. LIEBMAN*
435 W.116th St.
Box B-16
New York, NY 10027
(212) 854-3423

*Counsel of record

KEITH A. FINDLEY
Assistant State Public Defender
Office of the State Public Defender
Trial Division
P.O. Box 7884
Madison, WI 53707
(608) 267-5026

RICHARD C. NEUHOFF
609 Harrison St., Suite 535
San Francisco, CA 94107
(415) 543-0433

ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act") on April 24, 1996. The Act's habeas corpus title, inter alia, amends 28 U.S.C. §2254 (d). This petition presents the following questions concerning the Act and amended §2254 (d):

I.

Whether the court of appeals correctly concluded that Congress, despite an explicit provision in §107(c) of the Act, failed to specify the extent to which the Act's habeas corpus revisions are to apply retroactively to pending habeas cases; and, if so, whether the court correctly interpreted this Court's retroactivity jurisprudence to depend upon proof of actual reliance interests and to create a presumption that habeas-curtailing statutes apply retroactively?

II.

Whether the court of appeals correctly concluded that §2254(d)'s provision for habeas corpus relief when a state court "decision was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States" forbids relief when the state decision erroneously applied the Constitution to the facts of a particular case as a matter of this Court's clearly established law; and, if so, whether that result violates Article III or the Suspension Clause of the Constitution?

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, WARDEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE COURTS OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Aaron Lindh respectfully requests that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals affirming the denial of habeas corpus relief.

OPINIONS BELOW

The opinion of the court of appeals, Lindh v. Murphy, 1996 WL 517290 (7th Cir. Sept. 12, 1996) (en banc), is in Appendix A. The unpublished opinion of the district court is in Appendix B. In Appendix C is the Wisconsin Supreme Court opinion, State v. Lindh, 468 N.W.2d 168 (Wis. 1991), reversing the Wisconsin Court of Appeals' grant of a new trial (State v. Lindh, 457 N.W.2d 564 (Wis. App. 1990), Appendix D) and affirming Mr. Lindh's conviction and consecutive life terms plus 35 years.

JURISDICTION

The court of appeals entered judgment on September 12, 1996. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). As he did below, Mr. Lindh asserts the deprivation of rights secured by the United States Constitution and 28 U.S.C. §§2241-2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves U.S. Const. Art. I, §9, ¶2; Art. III; Art. VI, ¶2; Amend. VI, XIV. It also involves 28 U.S.C. §§2241-2266. These provisions are reproduced in Appendix E.

STATEMENT OF THE CASE

A. Statement of Facts

At noon on January 15, 1988, Petitioner Aaron Lindh left a meeting with City Police Department officials in the City-County Building in Madison, Wisconsin and went to his car. Upset at the City Police Department's failure to solve two burglaries at his apartment, Lindh took a .22 caliber rifle from his car, went back into the Building to the offices of the Dane County Sheriff's Department (with which he had no quarrel) and began shooting people he had never met. A sheriff's secretary and the county medical examiner died; a private citizen was wounded. Lindh then pointed his rifle at an armed deputy sheriff and advanced, shouting "Shoot me! Kill me!" The deputy shot him. C-3, C-4, D-2.[1] Lindh had a history of psychiatric problems. R:2:Tab-B:17.

While Lindh was undergoing surgery, the District Attorney ("D.A.") retained Dr. Leigh Roberts, a forensic psychiatrist, to help the state meet an insanity defense. That evening, Dr. Roberts interviewed Lindh in the intensive care unit. Subsequently, Roberts was to interview Lindh again and file a report with the prosecutor—on August 17, 1988—concluding that Lindh had no mental disease at the time of the shootings. Roberts repeated his August 17 conclusions at trial, where Lindh's sanity was the only contested issue. Roberts' testimony was the mainstay of the state's case. A second psychiatrist appointed by the court and a third retained by the defense testified that Lindh was suffering from a mental disorder when his dispute with the City Police Department turned into a shooting spree at the County Sheriff's Department. C-7, C-8, D-3 to D-5.

[1]Opinions in the appendices to this Petition are cited by appendix and page number. The trial transcript is not in the federal habeas record. Although Mr. Lindh is indigent, the state refused to furnish it (cf. Rule 5 of the Rules Governing §2254 Cases); the district court denied Lindh's motion to compel production (B-2); and the court of appeals denied Lindh's motion to supplement the record with relevant transcript excerpts (A-8, A-19). The direct appeal briefs are in the record and are cited as "R:2:Tab __." The Appendix to Lindh's Supplemental Brief below is cited as "SA"; his Supplemental Reply Brief below is cited as "LRB."

Six weeks after the state retained Dr. Roberts on Lindh's case, the psychiatrist learned that a patient had charged him with having sexual relations with her during treatment sessions. This conduct, Roberts knew, was a felony under state law. Two months later Roberts learned that the State Medical Examining Board was investigating allegations that he had sexually exploited three patients. A month later—the day after Roberts interviewed Lindh a second time at the prosecutor's request—University of Wisconsin Hospital officials informed the D.A. that their investigation of the patients' allegations had led them to suspend Roberts' hospital privileges and refer the matter to the D.A. for investigation of felony charges. D-4.[2]

Noting that a "conflict of interest" would arise if the D.A. kept Roberts employed on Lindh's case while simultaneously investigating him, the D.A. elected to continue employing Roberts and refer the allegations against him to a prosecutor in another county. About a month after the D.A. told Roberts of the Hospital's charges and the D.A.'s referral of them, Roberts filed his report with the D.A. finding Lindh free of mental disease. C-5, R:2:Tab B:App.113.

Just before trial, the Medical Examining Board publicly moved to suspend Dr. Roberts' license because he had sexually exploited three patients. After learning of the Board's actions, defense counsel requested potential impeaching information about Roberts, and the D.A. revealed the Hospital's allegations and the D.A.'s consignment of them to another prosecutor's office. R:2:Tab B:12-13 & App. 103-14.

The D.A. then filed a motion in limine to forbid cross-examination of Dr. Roberts concerning "any possible ramifications of the [criminal] allegations" against him including his suspension by the University of Wisconsin Hospital. The trial court based its "blanket granting of the motion in limine" on the D.A.'s decision not to investigate Roberts but to refer the matter elsewhere.[3] D-4, R:2:Tab B:13-16 & App.11.

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[2]The Wisconsin Supreme Court wrote that the record does not show Roberts' hospital suspension. C-6. The record shows that defense counsel, the D.A. and the trial judge all believed that, if cross-examination were allowed, Roberts would testify that the Hospital had suspended him. R:2:Tab B:14-16; A-19.

[3]Three months after Lindh's trial, Roberts pled guilty to one count of sexual exploitation. On the prosecutor's recommendation, the judge spared Roberts any jail time or fine, citing his work on behalf of prosecuting authorities "throughout the State of Wisconsin as a forensic psychologist." A-18, A-26.

Wisconsin bifurcates the trial when the defendant pleads "not guilty by reason of mental disease." At the first phase, the jury decides whether the state has proved the elements of the offense beyond a reasonable doubt. At the second phase, the jury decides whether the defendant has proved that he had a mental disease when he committed the offense. If the defendant meets his burden, the jury enters a verdict of "not guilty by reason of mental disease." If not, it enters a verdict of "guilty." Wis. Stat. §971.165.

Following a jury finding that Lindh committed two counts of first-degree murder and one of attempted first-degree murder, Dr. Roberts was called as the state's "principal witness" at the second phase. D-5. To accredit his opinion that Lindh had no mental disease, Roberts testified to his employment by the University of Wisconsin Medical School, work "in relation to religion and mental health" including as a teacher at a theological seminary, receipt of an award "as essentially the mid-west psychiatrist of the year," and a loving relationship with eight grandchildren "up to nearly the age of Mr. Lindh." Id. Accepting Roberts' view that Lindh was not suffering from a mental disease, the jury found him guilty. "Accordingly, a judgment of conviction was entered against Lindh on all charges." C-3.

A verdict of "not guilty by reason of mental disease" would have required Lindh to be confined in a state mental facility for a minimum of six months. At that time and at six-month intervals thereafter, a state court would have had to entertain Lindh's petition for release and "grant the petition unless [the court] finds by clear and convincing evidence that the person would pose a significant risk of bodily harm to himself or herself or to others ...." Wis. Stat. §971.17(4). In fact, the judge sentenced Lindh to two consecutive life sentences plus 35 years. A-1. He must serve a minimum of 35 years, 7 months and 23 days before becoming eligible for parole. Wis. Stat. §§302.11(1), 304.06(b) (1988).

The Wisconsin Court of Appeals reversed Lindh's convictions. The court concluded that "the jury could have reasonably inferred that a witness in the position of Dr. Roberts," under criminal investigation by a "state authority," would "perceive that he would benefit if he testified against Lindh or that he would suffer retaliation if he testified in favor of Lindh." D-7. "The error prejudiced Lindh," because Roberts was

the only one of the three testifying experts who asserted that Lindh had no mental disorder. Id.

A divided Wisconsin Supreme Court reversed. Without objection from the state, the court applied the Confrontation Clause to the sanity phase but concluded that the Clause left the trial court wide "discretion" over cross-examination and that this discretion was not abused by barring cross-examination about the criminal allegations against Dr. Roberts and the D.A.'s handling of them. C-8 — C-9. Because these circumstances did not involve "a prototypical form of bias"—Roberts was not testifying for and vulnerable to "the same ... prosecuting attorney" or prosecutors "in the same jurisdiction," and "[c]riminal process of some sort against the witness, even if only at its initial stages," was not "a reality"—cross-examination was not constitutionally required. C-12.

Lindh did not seek certiorari or state postconviction relief. Instead, on July 9, 1992, he filed a federal habeas petition presenting the confrontation claim. R:1. The state answered that a violation did not occur or did not affect the trial as a whole. It declined to file the trial transcript. R:2; supra note 1. Mr. Lindh moved to compel production of the transcript and set a briefing schedule. R:5. The state asked the court to defer ordering a transcript and accept briefs on an argument not raised in the Wisconsin courts: that the Confrontation Clause does not apply at the sanity phase. R:5. On September 22, 1992, Lindh replied asking the court to order the transcript or to take briefs on the state's new argument. R:6.

For the next 18 months, nothing happened, aside from Mr. Lindh's filing three letters requesting prompt action. SA 157-61, 167-71. Two days after Lindh's third letter, on March 4, 1994, the district court ordered briefs on the Sixth Amendment's application to the sanity phase. Briefs were timely filed by early May. R:9-13.

For the next 17 months, nothing happened, aside from further correspondence from Mr. Lindh seeking a prompt ruling. SA 172. On October 4, 1995, the District Court denied the petition, declining to order a transcript or to address the issue the parties had briefed and concluding that the Sixth Amendment permitted denial of cross-examination into whether past or hoped-for prosecutorial favors

relating to the criminal allegations against Dr. Roberts had biased his testimony. B-1.

Mr. Lindh appealed, arguing his case to a panel on April 9, 1996. The Antiterrorism and Effective Death Penalty Act ("the Act") became law two weeks later. On May 1, 1996, the court of appeals sua sponte announced that it would hear the case en banc prior to a panel decision and directed the parties to file briefs on the Act's amended §2254(d). By a vote of 8 to 3, the Court held that §2254(d) barred relief.

B. The Decision Below

The court of appeals first addressed Mr. Lindh's argument that amended §2254(d) does not apply to his long-pending petition because §107(c) of the Act expressly designates the class of "cases pending on ... the date of enactment of this Act" to which its habeas amendments do apply—specifically, capital cases in "opt-in" jurisdictions (see infra p.13)—and Mr. Lindh's case is not within that category. The court ruled that §107(c) creates "at most a negative implication" of congressional intent. It declined to draw that implication rather than the possible "competing inference ... that Congress could not agree on an effective-date provision for the amendments [which include §2254(d)]" or "overlooked" the matter. A-3.

The court then held that applying §2254(d) to Lindh's case would not have a "retroactive" effect within Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994). After citing several reasons why the application of §2254(d) to pending cases could be held to fall outside the "definition of retroactivity," the court confronted Landgraf's presumption against applying a statute when it "attaches new legal consequences to events completed before its enactment." Id. at 1499. Taking issue with the two other circuits that had addressed the matter, the court held that any effects of amended §2254(d) that would "reduce [Lindh's] chance of prevailing" from what it was when he filed his petition "will not do" as a new consequence under Landgraf. A-7, A-4. The only completed events to which new consequences can attach so as to bring the Landgraf presumption into play are particular actions that Lindh can prove he took in "reliance on the prior state of the law." A-7. Apprehension of a lowered chance of prevailing in federal habeas proceedings would not have affected Lindh's decision to forgo state postconviction proceedings

or certiorari because (1) Wisconsin law requires an "unusual reason" for a collateral attack, which Lindh did not identify; and (2) Lindh's case does not present "an abstract legal question" but a claim that the state courts misapplied settled law to the facts, so he "had no prospect in 1991 of receiving an audience in the Supreme Court" and "gave up nothing" by not seeking certiorari. A-7, A-8. In response to the argument that this Court exercises its certiorari power with advertence to the availability vel non of habeas review, LRB 12-13, the court limited Lindh to his own behavior; he "cannot successfully argue that the change of law [would have] affected the judicial process." A-5.

The court next construed the central provision of amended §2254(d) that bars relief on constitutional claims adjudicated in state court unless the state "decision ... was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." A-6. Conceding that "Congress lacks power to ... require federal judges to 'defer' to the interpretations reached by state courts," the court asked whether §2254(d) "tell[s] us to 'defer' to state decisions." A-13, A-9. Because "the word 'deference' does not appear in the statute"—and because federal deference to state "jurisdictions bound by [the Supremacy Clause] is not sensible"—the court held that the statute does not require deference. A-9. "The first phrase of §2254(d)(1)—authorizing a federal court to issue the writ when the state court's decision is 'contrary to ... clearly established Federal law, as determined by the Supreme Court ...' preserves ... federal courts' independent interpretive power." Id. "We must ensure that the Supreme Court of Wisconsin adheres to legal principles articulated by the Supreme Court of the United States." A-11.

The court did not, however, "read the 'contrary to ...' language to authorize issuance of a writ whenever a [state] court errs." Id. "[W]hen the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts—when it is, in the standard phrase, a 'mixed question of law and fact'—§2254(d)(1) restricts the grant of collateral relief to cases in which the state's decision reflects 'an unreasonable application' of the law." Id. The court consigned "mixed questions" to the "unreasonable

application" phrase to keep it from being "vitiate[d]" by the "decision contrary to law" phrase. Id. Because mixed questions are ones "of degree," "painted in shades of grey, rather than in contrasting colors, a responsible thoughtful answer reached after a full opportunity to litigate is adequate ...." A-12.

The court summed up the "line" separating review under §2254(d)'s "decision contrary to law" phrase and its "unreasonable application" phrase as "[d]e novo ... review for core legal issues such as whether the Confrontation Clause applies, and deferential review for operational decisions within areas in which the constitutional norm allows discretion." A-18.

Under this reading of amended §2254(d), the court gave two reasons for denying Lindh relief:

1. The court found that there is no "clearly established" Supreme Court law requiring confrontation at proceedings like Wisconsin's sanity phase. The court located this issue between precedents denying confrontation at sentencing and Specht v. Patterson, 386 U.S. 605 (1967), which required confrontation at a hearing to determine whether a defendant convicted of indecent liberties would be sentenced to a term of 0 to 10 years, or to an indeterminate term of one day to life upon a finding that the defendant "is an habitual offender and mentally ill." A-15. Because Specht's second phase could "increase[] the maximum punishment" while Lindh's second phase could only decrease the minimum period of his incarceration, the court found that Specht was not dispositive. Id. Three judges dissented. A-20.

2. Even if the Clause does apply, the court held, the Wisconsin Supreme Court decision was not "contrary to ... clearly established Federal law" because the "opinion ... correctly states the holdings" of this Court's confrontation decisions. A-18; see id. (state court "asked the legally correct question"). And the state court's application of those decisions to the facts was not "unreasonable" because, as the majority read those decisions, if the trial judge permitted cross-examination of any sort to show that Roberts might not be telling the truth, the judge had discretion to completely bar cross-examination into particular motives to lie. A-18. This being only a question of "degree," the state court's "fact-specific answer cannot be called 'unreasonable' even if it is wrong (as some members of this court who join this opinion

believe)." A-18. Three judges dissented. See A-24.

The court gave two reasons why Article III allows Congress to confer jurisdiction on a federal judge to review a state decision for consistency with the Constitution but order the judge to leave the decision in effect even though it is "wrong" as a matter of law. A-18.

1. The court's first reason simultaneously explains why Congress may not "require federal judges to 'defer' to the interpretations reached by state courts" (A-13) but may require "deferential review for operational decisions" such as whether denying cross-examination into a motive to lie violates the Constitution. A-18. Because applying legal rules to facts is not interpretive activity, it demands no judicial independence and permits deference: When a dispute is about the Constitution's "application to a particular set of facts—when it is, in the standard phrase, a 'mixed question of law and fact'"—the "dispute lies not in the meaning of the Constitution." A-11 (emphasis added).

2. There is a "distinction between rights and remedies." A-13. "Regulating relief is a far cry from limiting the interpretive power of the courts." Id. So, as long as a federal court remains free to state that it disagrees with the state court's conclusion about a federal "right," Congress may compel the federal court to leave the state court's judgment in force as "an operational decision"—a mere wrong without a "remedy." Id.[4] Two judges dissented. A-26.

REASONS THE COURT SHOULD GRANT A WRIT OF CERTIORARI

A key provision of amended §2254(d) permits habeas corpus relief from unconstitutional confinement if the state court "decision [supporting the confinement] was contrary to ... clearly established Federal law as determined by the Supreme Court." The court below construed this provisions as forbidding relief when a state decision applying the Constitution to the facts is "wrong" under the Court's clearly established legal standards, unless the error was so gross as to be "unreasonable." The court held that Article

[4]As long as "Federal courts are free to express an independent opinion on all legal issues in the case," the "'judicial Power of the United States' (Art. III §1) [which] is the power to interpret the law independently" is maintained. A-10, A-12.

III lets Congress empower federal judges to review state court decisions for consistency with the Constitution but require them to leave such a decision in force and effect although it comes to a result that is at odds with the supreme law of the land. The unheard-of, novel consequences of these rulings were applied retroactively to Lindh's four-year-old petition despite manifest congressional intention not to affect previously filed cases of Lindh's type and despite the Landgraf presumption against retroactivity, which the court below converted into a rule about reliance.

The conclusions announced below conflict with all other circuit decisions on point, and with venerable notions about the prospectivity of law, the meaning of "law," and the function of Article III judges and the writ in maintaining the supremacy of national law. To see why, it is useful to examine the combined effect of the lower court's conclusions on a typical habeas case.

Consider a prisoner convicted on a confession that the state courts held voluntary under the established rule of Brown v. Mississippi, 297 U.S. 278 (1936). Before the 1996 amendment of §2254(d), a federal habeas court treated a petition raising an involuntariness claim as "a new suit brought ... to enforce a civil right." Ex parte Tom Tong, 108 U.S. 556, 560 (1883). The court adjudicated the claim entirely de novo, paying the state supreme court's decision no more heed than other relevant authority—i.e., treating it as nothing more than "the conclusion of a court of last resort of another jurisdiction." Brown v. Allen, 344 U.S. 443, 458 (1953).

Such a claim was governed by "the longstanding position that the ultimate question of the admissibility of a confession ... [is] a legal inquiry requiring plenary federal review." Miller v. Fenton, 474 U.S. 104, 115 (1985). Even if the state opinion correctly stated the rule of Brown v. Mississippi and its progeny, the federal court was obliged to grant relief if the decision applying that rule and admitting the confession was wrong. Teague v. Lane, 489 U.S. 288 (1989), did not alter this responsibility when it barred the creation of new legal rules on habeas. For "the rule in question is one which of necessity requires a case-by-case examination of the evidence, ... a rule designed for the specific purpose of evaluat-

ing a myriad of factual contexts," which "can tolerate a number of specific applications without saying that those applications themselves create a new rule." Wright v. West, 505 U.S. 277, 308-09 (1992) (Kennedy, J., concurring in the judgment).

In short, then, if a prisoner's conviction rested on a confession that the state courts had held voluntary by applying the governing legal standard to the totality of circumstances, but that a federal court would find was involuntary under the same standard and circumstances, the prisoner's filing of a habeas petition triggered an unconditional right to release or retrial. This remedy was qualitatively superior, in virtually every case, to other state and federal remedies, given its "as of right" character, immunization from res judicata defenses, and availability without further development of the record.

Indisputably, amended §2254(d) changes things in the cases to which it applies. The crucial questions are what and how much it changes, and to what cases it does apply. By its terms, amended §2254(d) follows Teague's lead in limiting federal habeas review to rules of law that are not new—i.e., to rules that were "clearly established" at the time of direct review. Extending Teague, the amendatory language of §2254(d)

- requires federal courts to treat the state decision as more than relevant authority—as the focus of review, and, barring a statutorily specified error, the law of the case;
- unqualifiedly limits federal review to legal rules in effect when the state court ruled—thus abandoning Teague's application on habeas of law announced after the state court ruled but before certiorari was due or denied (or even later, in two exceptional circumstances); and
- confines review to legal rules that bound the state courts when they decided the case—i.e., rules that were clearly established by this Court, and not just by a federal circuit court.[5]

This is what §2254(d) as amended says it does. But on the elaborate reading given it by the court below, the statute goes much further and in quite unrecognizable directions. On that reading, a federal court's finding of a constitutional violation in admitting an involuntary confession into evidence would

[5]Compare Ciak v. United States, 59 F.3d 296, 302-03 (2d Cir. 1995); Lewis v. Erickson, 946 F.2d 1361, 1362 (8th Cir. 1991) (relying on circuit precedent to show that rule was not "new" under Teague).

result in habeas relief only if the state court that upheld the violation somehow managed to misstate the one-word "voluntariness" test—only if its "opinion ... [in]correctly states the holdings" of Brown v. Mississippi and its progeny. A-18. If the state court has correctly articulated the rule but incorrectly applied it to the facts so as to produce an outcome that "errs" under established standards, the federal court (in all but a few "grave" cases, A-11) can exercise its "judicial Power" under Article III only by ineffectually pointing out the error. A-11. Though it is "free to express an independent opinion on [the] legal issues in the case," it cannot attach any legal consequence to its conclusion that the decision conflicts with "the supreme Law of the Land." A-10. Despite its statutory jurisdiction to review the state decision for conformity with the Constitution, it must leave the constitutionally erroneous decision in force.

And in deciding whether the state court's error was "unreasonable" or "grave," the court must consider that the requisite totality-of-circumstance analysis is "painted in shades of grey, rather than in contrasting colors." A-12. Consequently, the state court's "fact-specific answer cannot be called 'unreasonable' even if it is wrong." A-18 (emphasis added).

The reading below thus turns habeas corpus from a right to relief when a state court has erroneously applied clearly established law to the totality of facts into a summary denial of relief in that situation. It changes habeas from a remedy having every advantage over alternative remedies into one that is inferior to any remedy with the minutest possibility of success.

The court of appeals' attribution of these drastic consequences to the 1996 Act and their retroactive application to Mr. Lindh's case present five reasons for this Court's review, discussed in turn below:

I. The Act's Applicability to Pending Cases

The first two questions warranting this Court's review arise out of the decision below to apply amended §2254(d) retroactively to Mr. Lindh's four-year-old habeas petition. To apply the statute retroactively, the court of appeals had to disregard its terms and distort the governing rules set down in Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994). It is not surprising, then, that the court's decision

conflicts with those of all the other courts of appeals that have addressed these issues and with a large majority of district court decisions.[6]

A. Statutory Intent

In 1994, this Court recognized that its "precedents [had] left doubts about what default rule would apply in the absence of congressional guidance" on the question of the applicability of new statutes to pending cases. Landgraf, 114 S.Ct. at 1494. To resolve the "Congressional doubt concerning judicial retroactivity doctrine," id. at 1495, the Landgraf Court clearly informed Congress that future substantive legislation would normally be presumed not to apply to pending cases.

Just two years after Landgraf, Congress enacted the 1996 Act. Title I of the Act, entitled "Habeas Corpus Reform," contains essentially two sets of revisions of habeas law. First, Title I amends four of the preexisting habeas provisions in Chapter 153 of the Judicial Code. Second, Title I adds an entirely new chapter to the Judicial Code, Chapter 154, which consists of six provisions applicable only to capital cases from qualifying States that have opted to establish state postconviction procedures meeting certain requirements. §107(a), enacting 28 U.S.C. §§2261-2266. The Chapter 154 revisions are commonly referred to as the "opt-in" provisions. New §2254(d)—the revision applied by the court of appeals in this case—is one of the revisions to Chapter 153.

Presumably aware of Landgraf's recent crystallization of a "predictable background rule against which to legislate" and plainly mindful that Congress itself should "affirmatively consider[] the potential unfairness of retroactive application and determine[] that it is an acceptable price to pay for the countervailing benefits," 114 S.Ct. at 1501, Congress expressly specified those pending cases to which its 1996 revisions would apply. It did so in two particulars.

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[6]E.g., Huynh v. King, ___ F.3d ___, 1996 WL 506268 at *7 n.2 (11th Cir. Sept. 23, 1996); Boria v. Keane, 90 F.3d 36 (2d Cir. 1996); Edens v. Hannigan, 87 F.3d 1109 (10th Cir. 1996); Cockrum v. Johnson, ___ F. Supp. ___, 1996 WL 42563 (E.D. Tex. July 25, 1996); Grady v. Artuz, 931 F. Supp. 1048 (S.D.N.Y. 1996); Warner v. United States, 926 F. Supp. 1387 (E.D. Ark. May 10, 1996).

First, in §107(c), Congress provided that "Chapter 154 of title 28, United States Code (as added by subsection (a) [of §107]) shall apply to cases pending on or after the date of enactment of this Act" (emphasis added). By §107(c)'s express terms, Congress identified which "cases pending on the date of enactment" would be subject to the revisions in the Act, and it identified which of the revisions would apply to those pending cases. Congress made all of the Chapter 154 revisions applicable to those pending capital cases that came from qualified opt-in jurisdictions.

Congress did not stop there. Had it enacted only §107(c), then only the new Chapter 154 provisions would have applied to the targeted pending cases; the revisions to Chapter 153 were not among those made applicable "to cases pending on ... the date of enactment." §107(c). But Congress was making important revisions to provisions within Chapter 153, particularly §2254(d) (the section at issue in this case) and §2254(e) (narrowing the availability of evidentiary hearings). Because none of Chapter 153's provisions was independently applicable to pending cases, Congress had to take an additional step, beyond specifying that Chapter 154's provisions would apply to pending cases, to make amended §§2254(d) and (e) applicable in pending cases governed by Chapter 154.

And Congress did so. It enacted a provision within Chapter 154—§2264(b)—that specifically assimilates the new §§2254(d) and (e) into the proceedings for those pending cases that fall within Chapter 154's reach.[7] Had Congress intended that the revisions in Chapter 153 would apply to all pending cases, there would have been no need to enact §2264(b), because §§2254(d) and (e) would have been independently applicable. Section 2264(b) can only be explained if Congress intended to do precisely what §107(c) indicates: to make only those pending cases that are covered by Chapter 154 immediately subject

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[7]Section 2264(b) provides that "[f]ollowing review subject to subsections (a), (d), and (e) of section 2254, the court [in a Chapter 154 case] shall rule on the claims properly before it." Although §2264(b) refers to §2254(a), which was not amended by the Act, that reference is entirely logical: once Congress expressly made §2254(d) and (e) applicable to pending cases within Chapter 154's scope, it added a reference to §2254(a) to forestall a court from concluding, based on "expresio unius est exclusio alterius," that Congress had intentionally excluded §2254(a).

to provisions of the 1996 Act.

Despite these clear indications in the Act, the court of appeals concluded that Congress did not answer the "retroactivity question," A-2, but left the matter for the judiciary to resolve. The court found that §107(c) raised "at most a negative implication" as to the Act's temporal reach and that this "negative implication" was "weaker for the 1996 Act" than the one rejected by this Court in Landgraf. A-3. Then, instead of reading §2264(b) in conjunction with §107(c), the court of appeals inferred—using the very "negative implication" reasoning that it had just rejected with respect to §107(c)—that §2264(b) was designed to strictly limit those provisions of Chapter 153 that would be applicable in any Chapter 154 proceeding, including cases filed after enactment. A-3 — A-4. The court's reasoning was flawed at virtually every step.

First, the lower court completely misapplied Landgraf by inferring that Congress "le[ft] the subject [of Chapter 153's retroactivity] to judicial resolution." Landgraf did draw such an inference with respect to the 1991 Civil Rights Act, but only because (1) Congress had included a retroactivity provision in a previous version of the Civil Rights Act that was vetoed and then had excluded the retroactivity provision from the version that was enacted, and (2) at the time the 1991 Act was passed, this Court's "precedents left doubts about what default rule would apply in the absence of congressional guidance." 114 S.Ct. at 1494. Nothing remotely akin to these considerations exists in the present case. Here, not only does no affirmative evidence exist that Congress intended to foist the retroactivity issue off on the courts, but Congress knew from Landgraf itself that if it didn't make a contrary intent clear, a presumption of prospective application only would prevail.[8]

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[8]The court of appeals speculates that "[p]erhaps" Congress simply "overlooked" the question whether Chapter 153 should be applied to pending cases because "the changes to Chapter 153 and the new Chapter 154 originated in different Houses of Congress at different times." A-3. This speculation is inaccurate. Although the substantive provisions of Chapter 154 did originate in a "different House[] of Congress at [a] different time[]" from those of Chapter 153, this is not true of the retroactivity provision of §107(c). This provision was added in the Senate, after the Chapter 154 provisions and nearly all the Chapter 153 provisions (including new §2254(d)) were already in the bill. Compare 141 Cong. Rec. S7567 (May 25,

Second, the court of appeals misanalyzed what it termed the "negative implication" argument based on §107(c). The court assumed that because Landgraf rejected a "negative implication" argument in that case, a "negative implication" argument should fail in every case. This misreads Landgraf. There, the "negative implication" argument was premised on a provision in the 1991 Civil Rights Act that made two "comparatively minor and narrow provisions in a long and complex statute" prospective only. Id. at 1493. From this, the petitioner argued that Congress intended the rest of the "long and complex statute" to apply retroactively. The Court did not agree. It based its decision in part on the logical conclusion that Congress would not have "chosen to resolve the retroactivity issue through negative inferences drawn from two provisions of quite limited effect," and in part on the "uncertainty about the applicable default rule" which existed at the time the 1991 Act was passed. Id. at 1493-94, 1494-95 & n.12.

This Court's careful and considered approach to the "negative implication" argument raised in Landgraf is at odds with the court of appeals' assumption that such arguments are invalid or suspect as a class. And the factors that Landgraf pointed to as reasons why the "negative implication" argument failed there are the opposite of the factors that exist in Mr. Lindh's case. The provisions upon which the so-called "negative implication" would be based in the present case are not "comparatively minor and narrow provisions" of "quite limited effect." Section 107(c) makes the entirety of Chapter 154 applicable to pending cases, and Chapter 154 by itself comprises fully half of the Act's habeas revisions. Nor, two years after Landgraf, was Congress unaware of what inferences would be drawn from its silence. The Landgraf decision itself told Congress, before it enacted the 1996 revisions to Chapter 153, what conclusion would be drawn if it did not specify whether those revisions applied to pending cases.

Third, the nonretroactivity conclusion to be drawn from §107(c) is corroborated by Congress' simultaneous enactment of 28 U.S.C. §2264(b). As Mr. Lindh argued below, §2264(b) has the function of applying to pending cases covered by Chapter 154 a few important provisions within the otherwise

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1995) (S.735) with S.735 at 119-20 (April 27, 1995).

nonretroactive Chapter 153. The court of appeals claimed that this reasoning "misunderstands" §2264(b). A-3. According to the court, §2264(b) is a statute that delineates which provisions in Chapter 153 will have any application in Chapter 154 proceedings, not a statute that delineates which amended provisions will apply to pending Chapter 154 cases. Under the court's reading, only the Chapter 153 statutes listed in §2264(b) are adopted into Chapter 154, and those omitted are—by negative implication—"replace[d] [with a provision] more favorable to the states." Id. (emphasis omitted).

The court of appeals' willingness to give effect to a "negative implication" in connection with §2264(b)—but not with §107(c)—is unexplained and inexplicable. Moreover, the court of appeals' reasoning falls of its own weight. For, contrary to the court's claim, its interpretation of §2264(b) will lead to rules that are not "more favorable to the states" in Chapter 154 cases. A-3. Consider, for example, the court of appeals' assertion that the exhaustion doctrine of §§2254(b) and (c) has been supplanted by §2264(a). A-3. This would mean that the state in a Chapter 154 proceeding will not be able to request that some claims be exhausted in state court—as, e.g., when a federal petitioner can establish that the factual predicate for an unexhausted claim he is raising "could not have been discovered through the exercise of due diligence" at an earlier time. 28 U.S.C. §2264(a)(3). Such claims could not be returned to the state courts for exhaustion (and for state-court factfindings due a presumption of correctness in subsequent federal habeas proceedings) because, under the court of appeals' theory, the exhaustion statute has been "replaced" by §2264(a). There is no evidence in the legislative history that this was Congress' intent.[9]

The court of appeals' conclusion that Congress has not prescribed the pending cases to which the Act exclusively applies was wrong. The court ignored the central teaching of Landgraf, expanded Landgraf's other case-specific holdings beyond plausibility, and disregarded Congress' clear intent. Because of these errors, and because of the importance of a proper interpretation of the Act to the

[9]The same "negative implication" that (according to the lower court) makes §§2254(b), (c), and (f)-(i) inapplicable to Chapter 154 proceedings would also make the rest of Chapter 153's provisions inapplicable—including, e.g., the Act's new limitations on successive habeas petitions, in amended §2244(b).

functioning of the federal courts, review should be granted.

B. Retroactive Effect

Landgraf teaches that if Congress has not clearly spoken concerning a statute's retroactive reach, a court must then determine "whether the new provision attaches new legal consequences to events completed before its enactment." 114 S.Ct. at 1499. The court below ruled that amended §2254(d) has no such effects. The court based this conclusion on two premises: (1) that "new legal consequences" are limited to those that adversely affect a party's "legitimate reliance interest in the operation of the former law," A-2; see A-5, A-7; and (2) that there is a "presumpti[on]" that "legal changes that reduce the willingness of federal courts to set aside state judgments ... apply to existing judgments." A-6. Both premises are wrong.

1. Permeating the court of appeals' analysis is its assertion that the only "new legal consequences" that "matter[]" for retroactivity purposes are those that adversely affect a litigant's" legitimate reliance interest in the operation of the former law." A-2; see A-5 — A-7. This transformation of the "new legal consequences" inquiry into a search for "legitimate reliance interests" is entirely unsupported in the caselaw.

Landgraf itself specified a wide range of ways in which a "new legal consequence" might be found, and by no means were these limited to situations involving a "reliance interest." Among the kinds of statutory provisions that Landgraf indicated have "retroactive effects" are those that (1) "affect substantive rights," 114 S.Ct. at 1504, or (2) "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," id. at 1505, or (3) have "an impact on private parties' planning," id. at 1506, or (4) "sweep away settled expectations suddenly and without individualized consideration," id. at 1497, or (5) "change[] the legal consequences of acts completed before [the new statute's] effective date," id. at 1499 n.23, or (6) "give[] 'a quality or effect to acts or conduct which they did not have or did not contemplate when they were

performed," id., or (7) may "be retributive," id. at 1506, or (8) "creat[e] a new cause of action," id. at 1506, or (9) "chang[e] or abolish[] limits on the amount of damages available," id. at 1507 n.36, or (10) "restrict[] subcontractors' rights to recover damages from prime contractors," id. at 1507.

The court of appeals found that Congress had amended §2254(d) so as to transform Mr. Lindh's constitutional claim from one on which relief might well have been granted (see A-18) to one on which relief was impossible. The court did not deny that this reading constituted a change which "affect[ed] [petitioner's] substantive rights," 114 S.Ct. at 1504; "impair[ed] [statutory and constitutional] rights [petitioner] possessed" when he filed his petition, id. at 1505; and "change[d] the legal consequences" of completed state court proceedings, id. at 1499 n.23. Nor could the court reasonably have done so. If "changing or abolishing limits on the amount of damages available in wrongful death actions" is a "new legal consequence"—and if "restricting subcontractors' rights to recover damages from prime contractors" is, too—then changing the elements of a petitioner's already asserted claim, and limiting his preexisting right to relief for a constitutional violation, must also be "new legal consequences" under Landgraf. As the Second Circuit has held with respect to the 1996 Act, if "the new statute would require a different outcome, application of the new statute ... would be retroactive." Boria v. Keane, 90 F.3d 36, 37 (2d Cir. 1996). Any other conclusion flouts Landgraf.

Worse, the court of appeals' translation of "new legal consequences" into a "legitimate reliance interest" is a conceptual and practical disaster. This twist sends the courts down a long, chaotic, and uncharted road that can only lead to one of two unhappy destinations. Either every pending habeas case (indeed, every litigant's case, whenever any statute is amended without clear indications of congressional intent as to its application to pending cases) would have to be examined on an individual basis (as the court of appeals purported to do here, see A-8) to see what the party and his or her lawyers relied on in making significant litigation decisions in the case—an inquiry in which the courts would presumably have to conduct an evidentiary hearing as to the motives and bases of those decisions. Or, alternatively, the

courts would attempt to decide the issue of reliance on the basis of some generalized speculation as to what an entire class of litigants in petitioner's position would rely on (as the court of appeals also purported to do, see A-7 — A-8)—in which event, the courts would have to define the relevant class in each case: is it, e.g., all habeas petitioners?; all noncapital habeas petitioners?; all habeas petitioners with Sixth Amendment claims?; with claims involving "mixed questions of fact and law"?; all petitioners where the state court assumed the Constitution was applicable but refused to find a violation under the specific facts?

This Court's decisions culminating in Landgraf avoided diverting pending cases onto such a prolonged and ill-defined retroactivity sidetrack by broadly defining the concept of "new legal consequences." The court of appeals in this case, in contradiction to all decisions preceding it, has rerouted retroactivity analysis entirely. Certiorari should be granted to put the law back on track.[10]

The second permeating theme in the decision below is the assertion that "legal changes that reduce the willingness of federal courts to set aside state judgments presumptively apply to existing judgments." A-6; see A-7. This claim is meritless because the Court's "decisions do not support the proposition that there is a presumption in favor of retroactive application of [habeas-curtailing] statutes." Rivers v. Roadway Express, 114 S.Ct. 1483, 1518 (1994).

The court of appeals cited three kinds of decisions in support of its alleged presumption. The first was Felker v. Turpin, 116 S.Ct. 2333 (1996), in which this Court relied on one provision of the Act—

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[10]Even if one accepted the court of appeals' view that only "legitimate reliance interests" define "new legal consequences," it would be difficult to understand the court's insistence that Mr. Lindh showed no such interests. After the Wisconsin Supreme Court ruled in 1991, Mr. Lindh had to decide how to proceed. He could seek habeas relief in federal court, where the law at the time gave him a clear right to a de novo adjudication of his constitutional claim, or he could ask this Court to exercise its discretion to hear the case on certiorari. In reliance on the law as it then existed, Mr. Lindh gave up his chance for review by this Court, and opted for his right to de novo review via federal habeas corpus. That decision was informed by the fact that, at that time, this Court often declined to grant certiorari in "mixed question" cases precisely because commensurate federal habeas review was available. See, e.g., Wills v. Texas, 114 S.Ct. 1867 (1994) (O'Connor, J., concurring in denial of certiorari); O'Dell v. Thompson, 502 U.S. 995 (1991) (statement of Blackmun, J., respecting denial of certiorari); Spencer v. Georgia, 500 U.S. 960 (1991) (Kennedy, J., concurring in denial of certiorari); Irvin v. Indiana, 359 U.S. 394 (1959) (per curiam) (certiorari denied "without prejudice to filing for federal habeas").

disallowing this Court from granting certiorari to review a court of appeals' refusal to allow the filing of a successive federal habeas petition—in a case in which a successive petition was filed after April 24, 1996. Because Mr. Felker's petition was filed after the Act became law, no retroactivity issue was presented or decided in that case; still less was any "presumption" of retroactivity articulated.

The second kind of decision to which the court of appeals resorted as supporting a supposed presumption in favor of the retroactive application of habeas-curtailing legislation involved cases that it said applied previous habeas corpus amendments to pending habeas cases "without so much as remarking on the date of enactment." A-6. In three of the cases, there was a plain reason why no retroactivity question was discussed or decided: this Court was applying new statutes that simply codified existing judicial precedent.[11] In the fourth case—Carafas v. LaVallee, 391 U.S. 234, 239 (1968)—the Court's passing reference to an amended version of the habeas statute was included to show that the expansiveness of the new law supported the petitioner's arguments, which prevailed. Carafas has nothing whatsoever to say that might be relevant to a "habeas curtailing" amendment.[12]

The third kind of precedent cited by the court of appeals for its presumption about "habeas curtailing" amendments involves cases "holding that changes in the law affecting judicial ability to supply prospective relief govern pending cases." A-6. These holdings are utterly irrelevant. A grant of habeas relief operates retrospectively to vacate a prior unlawful judgment on the basis of past constitutional errors.

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[11]Smith v. Yeager, 393 U.S. 122, 124-25 (1968) (applying §2244(b), which codified Sanders v. United States, 373 U.S. 1 (1963)); Gusik v. Schilder, 340 U.S. 128, 131-33 & n. 4 (1950) (exhaustion rule was judicially created before being codified in §2254(b)); Darr v. Burford, 339 U.S. 200 (1950) (applying exhaustion requirement of §2254(b), which "embod[ied] the rulings drawn from the [Court's] precedents").

[12]There are cases—not mentioned by the court of appeals—that did explicitly discuss the question whether prior habeas amendments are retroactive. To the extent that these decisions resolved the issue, they decided that the amendments would not be applied to pending cases if they operated to the petitioner's detriment. Baines v. Swenson, 384 F.2d 621, 623 n. 3 (8th Cir. 1967) (presumption of correctness, added by 1966 amendment, is "inapplicable here since appellant's federal petition was filed before that date"); see also McDonald v. Kropp, 373 F.2d 549, 556-57 n.1 (6th Cir. 1967); Thompson v. MacDougall, 272 F.Supp. 313, 314 (D.S.C. 1967) (both noting retroactivity issue but avoiding it).

See Hilton v. Braunskill, 481 U.S. 770, 775 (1987) ("this Court has repeatedly stated that federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court" (emphasis added)).

The court of appeals' "new legal consequences" ruling is based on an unprecedented transformation of the concept of "new legal consequences" and on an alleged "presumption" that it invented out of whole cloth. The Court should grant review to preserve the integrity of its retroactivity jurisprudence.

II. §2254(d)'s Interpretation and Application

A. §2254(d)'s Interpretation

Under §2254(d), a habeas application "shall not be granted" with respect to a claim the state courts adjudicated on the merits "unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court ...."

These words are in common usage. Their plain meanings dictate the provision's meaning. We begin where there is no dispute:

1. Because of the word "or," relief is permitted in either of two situations (quoted here without eclipses):

- If the state "adjudication resulted in a decision that was contrary to clearly established Federal law."
- If that "adjudication resulted in a decision that involved an unreasonable application of clearly established Federal law."

2. "The first phrase of §2254(d)(1)—authorizing a federal court to issue the writ when the state court's decision is 'contrary to ... clearly established Federal law ...', preserves rather than undermines federal courts' independent interpretive power." A-10. As commonly defined, the words "contrary to law" call for plenary consideration, and that is how federal courts have interpreted those words in analogous

contexts in which one judge reviews another judge's legal decisions.[13]

3. Neither the "decision contrary to law" phrase nor the "involved an unreasonable application" phrase should vitiate the other.

Three additional things are plain from §2254(d)(1)'s words, though the court below ignored them:

1. The thing that §2254(d)(1)'s first phrase requires federal courts to review to see if it is "contrary to law" is the state court's "decision." A decision is a "conclusion of law upon facts"[14]—in lay terms, a "final and definite result of examining a question"; a "conclusion" or "resolution"; the bottom line.[15] It is, in other words, the result a court reaches when it applies the law to the facts.

The court of appeals never addressed the word "decision" that forms the subject of §2254(d)(1)'s first phrase, "decision that was contrary to law." Disregarding the provision's plain English was the court's first important interpretive mistake. For that let the court come up with a very different subject of "contrary to law" analysis, namely, the legal rule that the state court articulated in its opinion. See A-18 (whether the state "opinion ... correctly states the holdings" of the controlling Supreme Court cases or "asked the legally correct question"). The court synonymously referred to "interpretations reached by state courts" (A-13), making clear, however, that such "interpretations" include only verbalized legal meanings, not meanings constructed by a rule's application to facts:

[13]See Webster's Ninth New Collegiate Dictionary 285 (1984) ("contrary to" means "in conflict with"). District judges review certain magisterial determinations to see if they are "contrary to law," 28 U.S.C. §636(b)(1)(A), Fed. R. Civ. P. 72(a), and circuit courts use the same phrase to describe their review of district court decisions of law under Fed. R. Civ. P. 52(a). In both contexts, the courts describe their review of legal questions as "plenary" or "de novo." See, e.g., Saltarelli v. Bob Baker Group Medical Trust, 35 F.3d 382, 385 (9th Cir. 1994); Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993); Haines v. Liggett Group Inc., 975 F.2d 81, 91 (3d Cir. 1992); Polyplastics, Inc. v. Transconex, Inc., 827 F.2d 859, 860 (1st Cir. 1987); Gandee v. Glaser, 785 F. Supp. 684, 686 (S.D. Ohio 1992); Smith v. Smith, 154 F.R.D. 661, 665 (N.D. Tex. 1994).

[14]Black's Law Dictionary 842 (6th ed. 1990) (equating "decision" and "judgment"); see id. at 407 ("determination arrived at after consideration of the facts, and, in legal context, law").

[15]4 Oxford English Dictionary 332 (2d ed. 1989); Webster's Third New Intern'l Dictionary 585 (1981).

> [Under] the "contrary to ..." language ... we must ensure that the Supreme Court of Wisconsin adheres to legal principles articulated by the Supreme Court of the United States. But when the dispute lies not in the meaning of the Constitution, but in its application to a particular set of facts—when it is, in the standard phrase, a "mixed question of law and fact"—[the "contrary to ..." language does not apply and] §2254(d) restricts the grant of collateral relief to cases in which the state's decision reflects "an unreasonable application" of the law. (Id.)

2. The statute permits relief if, in the federal court's independent judgment, the state court decision was contrary to clearly established federal "law." At least since Justice Holmes observed that "law" is not a "brooding omnipresence" but "what the courts do in fact,"[16] this Court has understood that judges make "law" not only through "elaboration of constitutional principles" but also when "those principles ... [are] applied." Bose Corp. v. Consumer's Union, 466 U.S. 485, 508 (1984). Indeed, often "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case." Miller v. Fenton, 474 U.S. 104, 114 (1985) (emphasis added) (habeas case); see Ornelas v. United States, 116 S.Ct. 1657, 1662 (1996) (some "legal rules ... acquire content only through application").

In scores of the Court's opinions, therefore, "mixed questions of law and fact" have been "ranked as issues of law." Thompson v. Keohane, 116 S.Ct. 457, 465 (1995) (emphasis added) (citing numerous habeas cases).[17] And the Court "[o]n numerous ... occasions has set aside convictions" because, in its independent estimation, the law state courts made when they applied rules to facts was contrary to the Court's standards for such cases. Miller, 474 U.S. at 109.

The teaching of these cases is consistent with the established usage of "law" in American jurisprudence to encompass the meaning legal standards acquire when judges apply them to facts. That usage

[16]Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting); O.W. Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457, 461 (1897).

[17]See also, e.g., Kansas City S. Ry. v. C.J. Albers Comm'n Co., 223 U.S. 573, 591 (1912) (classically defining "mixed question" as one of law: "what purports to be a finding upon questions of fact [but] is so involved with and dependent upon such questions of law as to be in substance and effect a decision of the latter" (emphasis added)); Moore v. Dempsey, 261 U.S. 86, 92 (1923) (habeas case); Fiske v. Kansas, 274 U.S. 380, 385-86 (1927); Norris v. Alabama, 294 U.S. 587, 589-90 (1935); Davis v. North Carolina, 384 U.S. 737, 741-42 (1966) (habeas case).

pinpoints the court of appeals' second major interpretive error: its conclusion that "the meaning of the Constitution" can never emerge from the Constitution's "application to a particular set of facts." A-11. Only through this astonishing proposition could the court conclude that, when federal judges review a state decision to "make certain that [legal] principles have been constitutionally applied," Bose Corp, 466 U.S. at 508, they are not determining whether "the decision was contrary to [constitutional] law." A-13.

3. The juxtaposition of §2254(d)(1)'s first phrase ("decision that was contrary to clearly established Federal law, as determined by the Supreme Court") and its second phrase ("decision that involved an unreasonable application of clearly established [Supreme Court] law") conveys more plain meaning. The "contrary to law" phrase applies, and can only apply, when there exists "clearly established" Supreme Court caselaw to which a state decision can sensibly be called "contrary." Conversely, if a question is one that the Court's cases have never addressed, a state court's answer can and must stand unless it applies the Court's peripherally pertinent precedents in an "unreasonable" manner. When, that is, there is no law to which the state decision can be "contrary," §2254(d)—again echoing Teague—"validates reasonable, good faith interpretations of existing precedents." Butler v. McKellar, 494 U.S. 407, 414 (1990).

Indeed, Justice O'Connor has used the very "unreasonable application" language to refer to precisely the question whether a state decision applies available law so unmindfully or inhospitably that the opposite conclusion requires no resort to "new law." See Gilmore v. Taylor, 508 U.S. 333, 351 (1993) (O'Connor, J., concurring) (if the principles on which a prisoner relies are only broadly relevant, habeas relief may not be granted unless the state court decision was a "begrudging or unreasonable application of those principles" (emphasis added)).[18]

In reversing state decisions both in and outside the Teague context, this Court has identified

[18]Accord Thompson v. Keohane, 116 S.Ct. at 469 n.1 (Thomas, J., dissenting) (the Teague doctrine validates "reasonable applications of then-existing law"); see Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1032 n.18 (1992) ("objectively reasonable application of relevant precedents"); Florida v. Burr, 469 U.S. 914, 921 (1990) (Stevens, J., dissenting) ("reasonable application of ... precedent").

unreasonable applications of just the sort that §2254(d)(1) and Justice O'Connor describe. Prior to Stansbury v. California, 114 S.Ct. 1526 (1994), the Court had never decided whether an officer's subjective belief that a suspect was not "in custody" disposed of the question. But when the California Supreme Court held that it did, the Court easily concluded that the decision unreasonably applied principles implicit in a number of precedents discussing the attributes of custodial interrogation and focusing on the totality of, mainly objective factors. Id. at 1530.

Similarly, before Clemons v. Mississippi, 494 U.S. 738 (1990), the Court had left "open" the question whether the Eighth Amendment required resentencing when a court invalidated one of multiple aggravating factors that a jury balanced against mitigating factors to reach a death verdict. The Court previously had held that where the jury considered but did not weigh aggravators and mitigators, the invalidity of one of the aggravators did not require resentencing; and the Mississippi Supreme Court followed the latter rule in the "weighing" context. See Stringer v. Black, 503 U.S. 222, 230 (1992). To decide whether Clemons was Teague-barred on habeas, the Court first asked whether its rule "emerge[d] ... from any single case." Id. at 232. Because no case had "dictated" Clemons, the Court proceeded to consider the impact of more general precedent, eventually holding that the interplay of two "line[s] of authority"—the "general requirement of individualized sentencing and the more specific requirement that a sentence based on an improper factor be reassessed with care"—left "no arguable basis to support the view ... that at the time petitioner's sentence became final the Mississippi Supreme Court was permitted to apply a rule of automatic affirmance ... when one [of several aggravators] is invalid." Id. at 231 (emphasis added). Because, even before Clemons, no "reasonable minds could differ" about its rule, the rule applied in habeas. Id. For another example, see Tuggle v. Netherland, 116 S.Ct. 283, 285 (1995) (per curiam).

The court of appeals' third error was to ignore the meaning conveyed by §2254(d)(1)'s close juxtaposition of the phrases "contrary to clearly established law" and "unreasonable application of clearly established law." The first phrase applies if, but solely if, there is law on point to which a decision can

be contrary. The second phrase governs situations where merely adjacent law is available. Only by ignoring the "application[s] of law" to which Justice O'Connor referred in Gilmore, supra, and forgetting the central inquiry of the Teague line of cases and the other examples mentioned above could the court of appeals have imagined that the "unreasonable application" phrase would be vitiated if it were not read to monopolize mixed questions. It is, indeed, the court of appeals' reading that vitiates the statute, by limiting the decision-contrary-to-law phrase to the virtually null set of cases in which a state court miscopied a clearly established rule from the U.S. Reports into its opinion.

The court of appeals compounded this error by equating the statute's actual words, "application of law," with the distinct term-of-art for mixed questions: "application of the law *to the facts*." The equation is specious because legal authorities obsessively include the italicized words when referring to mixed questions,[19] but Congress omitted them.

The full impact of these errors emerges when the words of the statute Congress passed are compared to the very different words that the court of appeals imported into it. In Congress' version, a state court adjudication calls for relief if it

> resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

But in the court of appeals' version, a state court adjudication allows relief only if it

> resulted in a decision that was based on a stated rule or interpretation that was contrary to clearly established Federal law, as articulated [see A-11] in the decisions of the Supreme Court of the United States, or
>
> resulted in a decision that was based on an unreasonable application to the facts of clearly established Federal law, as articulated in the decisions of the Supreme Court of the United States.

Not only is the statute Congress wrote materially different from the one the court below concocted. The concoction is nearly identical to one Congress chose not to adopt.

The habeas title of the Antiterrorism Act began as the habeas title of a crime bill the House passed in early 1995. H.R.729, 141 Cong. Rec. H1404 (Feb. 8, 1995). Most of the House habeas title was imported wholesale into the 1996 Act. See S.735, 141 Cong. Rec. S5842 (Apr. 27, 1995). Not so §2254(d), which went into the Act only after Senate Judiciary Committee members rewrote it following "extended negotiations." See 141 Cong. Rec. S7803 (June 7, 1995) (Senator Specter). Yet each of the court of appeals' importations into the statute is a near identical throwback to the version Congress discarded. Under the House proposal, a state court adjudication would have given grounds for relief only if it:

> (1) resulted in a decision that was based on an arbitrary or unreasonable interpretation of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States; [or]
>
> (2) resulted in a decision that was based on an arbitrary or unreasonable application to the facts of clearly established Federal law as articulated in the decisions of the Supreme Court of the United States[.]

141 Cong. Rec. H1404 (Feb. 8, 1995) (emphasis added).

B. §2254(d)'s Application

The court of appeals' two reasons for denying Mr. Lindh relief reveal the severe repercussions of its reading of §2254(d).

1. The court acknowledged that "Roberts plainly would have been a 'witness against'" Lindh for Confrontation Clause purposes at a "unitary" trial at which Lindh had the burden of proving insanity. A-17. The court, however, thought it not "clearly established" that the bifurcated sanity phase was a "criminal prosecution[]" for Sixth Amendment purposes. A-15. Wisconsin's sanity phase (see A-1, A-22) (a) begins with a plea of "not guilty by reason of mental disease" and ends with a jury verdict of either "guilty" or "not guilty by reason of mental disease"; it (b) is a necessary predicate, upon a jury's finding that the

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[19] See, e.g., United States v. Gaudin, 115 S.Ct. 2310, 2314 (1995) ("application-of-legal-standard-to-fact sort of question ... commonly called a 'mixed question of law and fact'"); Ornelas, 116 S.Ct. at 1663 (Scalia, J., dissenting) ("application of an objective legal standard to the facts ... is properly characterized as a mixed question"); Thompson, 116 S.Ct. at 465 ("application of the controlling legal standard to the historical facts ... presents a 'mixed question of law and fact' qualifying for independent review"); Wright v. West, 505 U.S. 277, 300 (1992) (O'Connor, J., concurring in the judgment) ("so-called mixed questions or the application of constitutional principles to the facts"); Wainwright v. Witt, 469 U.S. 412, 429 (1985) ("'mixed question'" is present if "trial court's function was application of law to fact").

defendant lacks a mental disease, to the entry of "a judgment of conviction" against him (C-3); it (c) was treated by all three Wisconsin courts and the lawyers for both sides in those courts as governed by the Confrontation Clause;[20] and it (d) formally determined whether the minimum sentence that Lindh would have to serve before becoming eligible for release was 6 months in a mental hospital or 284 months in prison. See supra p.4.

The court below thought that Specht v. Patterson, 386 U.S. 605 (1967), did not "clearly" resolve the matter, A-17, although the only ground on which it could distinguish Specht—and the only respect in which Mr. Lindh's claim is not manifestly a fortiori from Specht—is that Specht's second-phase proceeding affected his maximum incarceration period while Lindh's affected his minimum incarceration period. This is literally a distinction without a difference. Nothing in Specht, nothing in the Confrontation Clause, and nothing said or hinted by the court of appeals remotely suggests the vaguest, most vagrant reason why the distinction could make any difference. If Specht did not "clearly establish" the applicability of the Confrontation Clause to Lindh's sanity trial, no constitutional decision of this Court has precedential value beyond its individual, episodic circumstances.

2. The court below was also unable to conclude that the Wisconsin Supreme Court's application of the Clause to Lindh's case "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established [Supreme Court] law." A-18. Although "some members" of the majority and three dissenting judges believed that the state decision was "wrong" under established law, A-18, A-26, the majority as a whole did not find it necessary to decide that question. Rather, the majority held that: (a) The Wisconsin court's "opinion ... correctly state[d]" this Court's Confrontation Clause doctrine and so was not "contrary to law." A-18. That doctrine, as articulated by the majority opinions in both the Wisconsin Supreme Court and the court below, gives a trial judge discretion to preclude all cross-examination into a particular ground for bias, as long as the judge permits the cross-examiner to inquire in some other way into the possibility that a prosecution witness is lying.[21] Id. (b) The validity of the state court decision thus came down to that court's handling of an abuse-of-discretion issue, a "mixed question" as to which §2254(d) does not "authorize issuance of a writ whenever a [state] court errs" but only when it errs "unreasonab[ly]." A-11. (c) Given the "deferential review" reserved "for [such] operational decisions," and given that the question "addresses a matter of degree about which thoughtful people can, and do, differ," the state court's "fact-specific answer cannot be called 'unreasonable' even if it is wrong." A-18.

We have already identified the errors of statutory construction that undermine this analysis. They are compounded by the acceptance of an adulterated form of Sixth Amendment doctrine that makes the right of confrontation largely discretionary with the trial judge. This is not the confrontation right that this Court has repeatedly enforced. Because "the partiality of a witness ... 'is always relevant,'" Davis v. Alaska, 415 U.S. 308, 316 (1974), "the Confrontation Clause ... requires a defendant to have some opportunity to show bias on the part of a prosecution witness." United States v. Abel, 469 U.S. 45, 50 (1984) (emphasis added). The opportunity extends to any fact that a witness may divulge which "a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony." Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). And at least since Olden v. Kentucky, 488 U.S. 227 (1988) (per curiam), it has been crystal clear that no matter how much cross-examination a trial court permits into other reasons for finding that a witness is lying, the trial judge does not have discretion to completely forbid the defendant's cross-examination into facts from which a "reasonable jury" could infer a motive to lie. Id. at 228, 232-33.

* * * * *

Besides the court below, three federal circuit courts have interpreted amended §2254(d). In square

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[20]By holding back until federal court the argument that the Sixth Amendment does not apply to Wisconsin's sanity phase, the state prevented that issue from being "adjudicated on the merits in State court proceedings" and, thus, from satisfying the predicate for §2254(d)'s application. But see A-15 — A-16.

[21]The state has conceded that the trial judge "wholly precluded" Lindh from cross-examining Dr. Roberts as to bias or motive to lie. Panel Brief, 31.

conflict with the decision below, all three granted relief on the basis of a state court's erroneous resolution of a "mixed question of law and fact"—in each case affording the petitioner plenary review under the "decision contrary to law" phrase, not "deferential" review under the "unreasonable application" phrase. Baylor v. Estelle, ___ F.3d ___, 1996 WL 497045, at *2-3 (9th Cir. Sept. 4, 1996); Dickerson v. Vaughn, 90 F.3d 87, 89, 92 (3d Cir. 1996); Ayala v. Speckard, 89 F.3d 91, 92, 97 (2d Cir. 1996). Certiorari should be granted to resolve the conflict between these decisions and the decision below, and between that decision and §2254(d)'s plain language, established principles regarding the interpretation of law, and—as we next demonstrate—the "cardinal principle" that courts should read federal statutes to avoid constitutionally questionable incursions on the function of Article III judges. See, e.g., Johnson v. Robison, 415 U.S. 361, 366-67 (1974).

III. Constitutionality Under Article III

The court of appeals' linguistically and jurisprudentially vexed reading of §2254(d)(1) unnecessarily put it in a bind. For it forced consideration of the constitutional power of Congress to require Article III judges to consider whether a state decision is contrary to the supreme law of the land while telling them to leave the decision in force and effect when it is.

No branch of our constitutional government may impair another Branch's "essential role ... in the constitutional plan." Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic, 66 Harv. L. Rev. 1362, 1365 (1953); see, e.g., United States v. Klein, 80 U.S. (13 Wall.) 128, 145-47 (1871). Indeed, this conception of the protected sphere of each separate branch must itself be taken as "inherent in the constitutional plan." Principality of Monaco v. Mississippi, 292 U.S. 313, 329 (1934).

The court of appeals recognized this principle. It identified as an essential attribute of the "judicial Power of the United States" which Article III, §1 vests in "such inferior Courts as the Congress may from time to time ordain and establish" that "Federal courts acting within their jurisdiction ... [must be] entitled

to interpret the law independently." A-11. "Once the judicial power is brought to bear by the presentation of a justiciable case or controversy within a statutory grant of jurisdiction, the federal courts' independent interpretive authority cannot constitutionally be impaired." A-13.

The problem is that the court of appeals stopped precisely there—or, in truth, about half-way there. It concluded that this essential attribute of the judicial power is preserved as long as "Federal courts are free to express an independent opinion on all legal issues in the case." A-10 (emphasis added). Congress may then forbid those courts to do anything to effectuate their opinion: Under the rubric of "[r]egulating relief," Congress may compel a federal judge to tolerate a state-court decision that the judge is statutorily required to review under the Constitution and that, in the judge's "independent opinion," conflicts with the supreme law of the land. A-13.

Moreover, in defining the "legal issues in the case" on which the federal courts must be "free to express an independent opinion," the court entirely excluded any dispute arising from "the Constitution['s] ... application to a particular set of facts—when it is, in the standard phrase, a 'mixed question of law and fact.'" A-11. A dispute of that sort, it concluded, "lies not in the meaning of the Constitution" and thus is outside the federal judges' constitutionally essential "independent interpretive power." Id.; A-10 (emphasis added). It was this conclusion that enabled the court to profess simultaneously that (1) "Congress lacks power ... to require federal judges to 'defer' to the interpretations reached by the state courts" (A-12), but that, (2) once having provided "[d]e novo ... review for core legal issues, such as whether the Confrontation Clause applies," Congress may then prescribe "deferential review for operational decisions" such as whether a trial court's denial of cross-examination violates the Clause (A-18).

These rulings trivialize what the Constitution makes essential. We have already noted the basic conceptual flaw in the latter one: It amputates at least half of what it means to "interpret the law." The notion that a dispute over the proper answer to a mixed question of law—a dispute over how the Constitution applies to a particular set of facts—lies "not in the meaning of the Constitution" is radically irreconcil-

able with this Court's frequent recognition in mixed question cases that "the relevant legal principle can be given meaning only through its application to the particular circumstances of a case." Miller v. Fenton, 474 U.S. at 114 (emphasis added).

Nor has the Court excluded mixed questions from the federal courts' constitutionally essential independent interpretive function simply because they are "painted in shades of grey, rather than in contrasting colors." A-12. As Justice Holmes saw long ago, that rule would vitiate the interpretive function as to all "[t]he great ordinances of the Constitution," which "do not establish and divide fields of black and white" but "terminate in a penumbra shading gradually from one extreme to the other." Springer v. Government of the Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting). No matter how much a "matter of degree" is the mixed question under review, therefore, the Court has never

> held in the past that federal courts must presume the correctness of a state court's legal conclusions on habeas, or that a state court's incorrect legal determination has ever been allowed to stand because it was reasonable. We have always held that federal courts, even on habeas, have an independent obligation to say what the law is.

Wright v. West, 505 U.S. 277, 305 (1992) (O'Connor, J., concurring in the judgment). Marbury indeed establishes the proposition:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.... This is the very essence of judicial duty.

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803) (emphasis added).

Even more demeaning to the judicial function is the conclusion that, in order to "[r]egulat[e] relief," Congress may entirely forbid Article III judges to effectuate their opinion that a state decision they are directed to evaluate under the Constitution is constitutionally "wrong." A-13, A-18. Once the lower federal courts are created by Congress and conferred with jurisdiction, Article III vests in them "the judicial Power." U.S. Const. art. III, §1. As the italicized word makes plain, what is vested is a practical thing, an effective thing, not merely its symbol. "[W]hen called into existence and vested with jurisdiction," federal courts "become possessed of the [judicial] power," and "the attributes which inhere in that

power and are inseparable from it can neither be abrogated nor rendered practically inoperative." Michaelson v. United States, 266 U.S. 42, 65-66 (1924) (emphasis added). "[T]he Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to decide them, subject to review only by superior courts in the Article III hierarchy— with the understanding, in short, that ... a 'judicial Power' is one to render dispositive judgments." Plaut v. Spendthrift Farm, 115 S.Ct. 1447, 1453 (1995) (second emphasis added). "If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance and the reality of control by Article III judges over the interpretation, declaration, and application of federal law." Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 725 F.2d 537, 544 (9th Cir. 1984) (en banc) (Kennedy, J.) (emphasis added).

The great object of this practical "power" is not judicial independence itself, but what is achieved by the judge's ability to interpret national law independently, namely, the preservation of that law's supremacy. A legal "declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained." St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51-52 (1936) (emphasis added). As this Court recognized only last Term, maintaining national legal supremacy requires judicial independence—and proscribes "deference"—not only in articulating legal rules (e.g., that searches require "probable cause") but also in applying those rules to the facts:

> A policy of sweeping deference would permit, "[i]n the absence of any significant difference in the facts," "the Fourth Amendment's incidence [to] tur[n] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause." Such varied results would be inconsistent with the idea of a unitary system of law.

Ornelas v. United States, 116 S.Ct. at 1662 (citation omitted). And the Supremacy Clause makes clear that this "end" of a "unitary system of law" to which the judicial power is committed has a special force when the decisions Congress has directed federal judges to review are those of "Judges in every State":

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof;

> and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, ¶2.

The court of appeals' construction of §2254(d), and of Article III to permit a statute thus construed, banish from both statute and Constitution everything that is practical about the "judicial Power" to keep national law supreme. In 28 U.S.C. §2241(c)(3), Congress has given Article III judges the duty to determine whether a prisoner "is in custody in violation of the Constitution or laws or treaties of the United States." Section 2254(a) tells them that they "shall entertain an application" for relief on those grounds. Section §2243 says they "shall summarily hear and determine the facts, and dispose of the matter as law and justice require." And amended §2254(d) directs them, in the process of adjudicating that "application," and in deciding what "law ... require[s]," to review the state court "decision" affirming the applicant's allegedly unconstitutional custody to determine whether it is "contrary to, or involved an unreasonable application of, clearly established [Supreme Court] law."

Inevitably, some federal judges following these directives will conclude—as some did here—that the state decision "is wrong" as a matter of clearly established law. A-18. When that occurs, the question becomes what those judges can do, in the practical exercise of their "judicial Power," to maintain national law as "the supreme Law of the Land"? How can they get beyond the "appearance" to "the reality of control by Article III judges over the ... application of federal law"? Pacemaker, 725 F.2d at 544. How can they get beyond being able to "rule on cases" to being able "to decide them"? Plaut, 115 S.Ct. at 1453. How, that is, can they make their "judgment[]" that the state court decision is wrong "dispositive" and not "practically inoperative"? Id.; Michaelson, 266 U.S. at 66.

The answer that the court of appeals reads §2254(d) to give, and Article III to permit, has nothing about it that is "power[ful]," "real[]" or "practical[]." The answer is, "Nothing." The appearance of judicial independence—the power to rule on cases—is maintained: "Federal courts are free to express an indepen-

dent opinion" that the state decision is "wrong." A-8, A-18. But the power to decide cases, to do something dispositive about that wrong ruling, is withheld: "we do not read [§2254(d)] ... to authorize issuance of a writ whenever a court errs." A-11.

The inevitable result of requiring federal courts to deny relief is to keep them from fulfilling their essential function in the constitutional plan. It forces the courts, having first been enlisted by Congress to scrutinize legal decisions for consistency with the Constitution, to leave in force and effect what they have independently determined to be law in conflict with the "supreme Law of the Land." For, when a legal principle is "given meaning" through its "application to the particular circumstances of a case," Miller, 474 U.S. at 114, and when that meaning is wrong, it is only by neutralizing that application—through which a prisoner is "in custody in violation of the Constitution"—that the Constitution's supremacy can be restored. What the Court has said about the federal courts' power to review the constitutionally consequential factfindings of an administrative agency applies with no less force to the consequential legal determinations of "the Judges in every State":

> But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards.

St. Joseph Stock Yards Co., 298 U.S. at 52; see Chapman v. California, 386 U.S. 18, 21 (1966) ("Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional principles themselves mean, what they guarantee, and whether they have been denied." (emphasis added)).

The court of appeals' understanding corrupts as well as trivializes "the judicial Power." For it treats as a constitutionally sufficient role for judges what this Court repeatedly has called illegitimate because it is beyond the judicial power, namely, the giving of advisory opinions. See Flast v. Cohen, 392 U.S. 83, 96 (1968). It thus will not do to sustain §2254(d) as reconstructed because it leaves federal courts "free to express an independent opinion on all legal issues in the case" (A-10) while robbing those

opinions of any legal force or effect. The federal courts' "power is to correct wrong judgments, not to revise opinions." Herb v. Pitcairn, 324 U.S. 117, 126 (1945) (emphasis added). So, "if the same judgment would be rendered by the state court after we corrected its views of federal law"—and, a fortiori, if the judgment will be left intact after the federal court gives its book report—"our review could amount to nothing more than an advisory opinion," which "[w]e are not permitted to render." Id. at 126.

The court of appeals' two most egregious mistakes converge in its claim that its reading of §2254(d) is no more constitutionally remarkable than "rights without remedies." A-13. For it is only because the court believes that state court decisions make no law when they apply rules to facts that it can equate denying relief from an erroneous state court decision with denying damages to a citizen unconstitutionally rousted from his home at the end of a police officer's nightstick. See Anderson v. Creighton, 483 U.S. 635 (1987). Yet, as we have seen, a state judge's "wrong" decision makes "law" in a way that the unconstitutional stroke of a police officer's baton can never do, no matter how hard it falls. That, of course, is why the Supremacy Clause singles out "the Judges in every State," but not the constables, as those whose uniquely law-making function requires that they be "bound" by the "supreme Law of the Land." And that is why the federal courts' essential function of keeping federal law supreme requires them to annul a state court's constitutionally erroneous legal decision, but not to remedy every police officer's constitutional tort.[22]

The other precedents the court cites to bolster its view that Congress may order federal courts to leave unconstitutional law in effect are no more apt. The statute it created has no precedent in our law:

1. Inferior courts acquire "judicial Power" only when Congress "from time to time ordain[s]" by

[22]The court of appeals' analogy to United States v. Leon, 468 U.S. 897 (1987), is even weaker. As Leon makes clear, excluding illegally seized evidence is not a remedy for the society-focused harm that unreasonable searches cause and, instead, is a prophylactic rule designed to deter future violations. When a court admits evidence unlawfully seized by a police officer in the good faith execution of a search warrant, therefore, it is the case neither that the court has preserved the effect of a legal decision that conflicts with the Constitution nor that it has denied a remedy to a wronged individual.

giving them jurisdiction over selected controversies. U.S. Const., Art. III, §1. For this reason, the many examples the court below cites of judges failing to override—or, rather, failing to review—state decisions, or aspects of those decisions, over which the judge had no power or jurisdiction are inapposite. In this category are cases refusing to inquire into a decision's legality under the Full Faith and Credit Clause, the res judicata doctrine, the rule of Stone v. Powell, 428 U.S. 465 (1976), and the absolute immunization from damages of judges acting in their law-making capacity, see Stump v. Sparkman, 435 U.S. 349 (1978). In none of these cases was a court statutorily directed to leave a decision in force after first (1) being statutorily directed to review the decision for consistency with the Constitution; and (2) finding them inconsistent. See Yakus v. United States, 321 U.S. 414, 468 (1943) (Rutledge, J., dissenting) ("It is one thing for Congress to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them."); Gutierrez de Martinez v. Lamagno, 115 S.Ct. 2227, 2234 (1995).

2. Equally inapposite for the purposes the court below tried to put them are the various cases accepting Congress' power to prescribe the controversies over which federal courts have "judicial Power" by specifying the body of law that defines those controversies and, in the process, screening out different controversies arising under different law. Indeed, this is the plain intent of amended §2254(d) as Congress wrote it, when taken in pari materia with unamended §2243. Section 2243 directs the court to "hear and determine the facts, and dispose of the case as law and justice require" (emphasis added). Amended §2254(d) then provides the choice-of-law rule for the "law" to which §2243 refers, namely, "clearly established Federal law, as determined by the Supreme Court of the United States." The Teague and Erie cases that the court below cites thus provide ample precedent for the choice-of-law statute actually enacted by Congress, but they provide none for the identify-unconstitutional-decisions-but-leave-them-in-force provision which the lower court substituted.

The Chevron doctrine is to similar effect. Under it, federal courts recognize situations in which

Congress has intentionally left statutory language undefined and either explicitly or implicitly delegated to an administrative agency the task of defining the language through supplementary positive law that Congress means to have the same force as the statute. See Medtronic, Inc. v. Lohr, 116 S.Ct. 2240, 2255-56 (1996); Chevron, Inc. v. NRDC, 467 U.S. 837, 843-44 (1984). In these situations, the reviewing court never leaves intact an administrative definition of statutory language that it considers to be "wrong" as a matter of law. Rather, the court (independently) decides whether the agency has acted within its statutorily delegated authority to define ambiguous language and, if so, follows Congress' directive to treat the law Congress' delegate has made as the law that applies. See Henry P. Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 27-31 (1983).

3. Nor do harmless error rules (or their "inevitable discovery" variant in Fourth Amendment law) support the court of appeals' denigration of "the Judicial power." If no result of the state court's decisionmaking is attributable to any legal analysis or procedure that a federal court determines to be "wrong," then whatever result the state court reached creates no erroneous federal law that "the judicial Power" commits a federal judge to correct.[23] Indeed, the harmless error rule is simply the flip side of the principle that the court below ignored: If the result the state decision reaches does give the Constitution an erroneous meaning—whether or not the state court enunciates an erroneous rule—the Constitution does not permit a federal judge to allow that meaning, and the result that creates it, to stand.

Congress has never adopted a statute of the sort the court below envisioned. That is not surprising because the constitutionality of such a statute would depend on a conception of Article III judges' independent interpretative function that excludes most of what judges in fact do, and a conception of "the judicial Power" that leaves judges powerless to effectuate their interpretations. The Court should grant

[23]The "adequate and independent state ground" doctrine is to like effect: If, given state procedural law, the outcome of the state proceeding would be the same, no matter what position the state court has taken on matters of federal law, then the state decision makes no federal law of a sort that could undermine the supremacy of national law, and "the judicial Power" to overturn legally wrong decisions is not triggered.

review to consider whether the Constitution sustains these dubious conceptions and, preliminarily, whether §2254(d)'s plain language actually presents that serious constitutional question.

IV. Constitutionality Under the Suspension Clause

Subsumed within Point III is a narrower one. Because no federal judge has ever been required to review a legal decision under federal law but leave it in force despite its conflict with federal law, such an anomalous procedure is completely alien to the history of habeas corpus. Since 1789, federal habeas judges have had the power to review judicial decisions for consistency with federal law (1 Stat. 73, 81-82); and they have always exercised that power by relieving their petitioners of the effects of such decisions within their jurisdiction when the decisions were found to be contrary to federal law.[24] Whether the writ the Suspension Clause protects is the one that "exists today ... [or] existed in 1789," Felker v. Turpin, 116 S.Ct. 2333, 2340 (1996), an essential function of it has been to preserve the supremacy of federal law.[25] By eviscerating that function, the reading of §2254(d) below effectively suspends the writ. "[F]or if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted." Ex parte Bollman, 8 U.S. (4 Cranch) 75, 95 (1807); see Smith v. Bennett, 365 U.S. 708, 712-13 (1961). The Court should grant review to resolve this additional conflict between the decision below and longstanding judicial interpretations and practice.

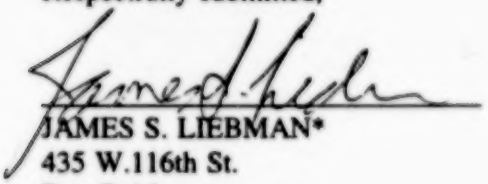
CONCLUSION

For the reasons set out above, the Court should grant a writ of certiorari to review the decision of the court of appeals.

[24]See, e.g., United States v. Hamilton, 3 U.S. (3 Dall.) 17 (1795); Ex parte Burford, 7 U.S. (3 Cranch) 448 (1806); Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807); Ex parte Watkins, 32 U.S. (7 Pet.) 568 (1833); Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873); Ex parte Siebold, 100 U.S. 371 (1879).

[25]See, e.g., Reed v. Farley, 114 S. Ct. 2291, 2297 (1994) (plurality opinion); Rose v. Mitchell, 443 U.S. 545, 561 (1979); Darr v. Burford, 339 U.S. 200, 214-15 (1950).

Respectfully submitted,



JAMES S. LIEBMAN*
435 W.116th St.
Box B-16
New York, NY 10027
(212) 854-3423
*Counsel of record

KEITH A. FINDLEY
Assistant State Public Defender
Office of the State Public Defender
Trial Division
P.O. Box 7884
Madison, WI 53707
(608) 267-5026

RICHARD C. NEUHOFF
600 Harrison St., Suite 535
San Francisco, CA 94107
(415) 543-0433

ATTORNEYS FOR PETITIONER

October 9, 1996

APPENDIX A

Copy mailed to petit attorneys for parties by the Court pursuant to Fed. R. Civ. P.77(d).

RECEIVED
JUL 28 1992
STATE PUBLIC DEFENDER
MADISON APPELLATE

U.S. DIST. COURT EAST DIST. WISC.
FILED
at _____ o'clock _____ m
SOFRON B. NEDILSKY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JUL 24 1992

AARON LINDH,

Petitioner,

v. Civil Action No. 92-C-0690

JAMES P. MURPHY, Warden,

Respondent.

DECISION AND ORDER

For the reasons below, this court grants petitioner Aaron Lindh's petition to proceed in forma pauperis and orders the respondent to answer or otherwise respond to his petition for writ of habeas corpus filed pursuant to Title 28 United States Code § 2254.

Background

After a bifurcated trial in Dane County Circuit Court, petitioner Aaron Lindh ("Lindh") was found guilty of: (1) one count of carrying a firemarm in a public building in violation of § 941.235 of the Wisconsin Statutes, (2) two counts of first degree murder with use of a dangerous weapon in violation of Wis. Stat. §§ 939.63 and 940.01, and (3) one count of attempted first degree murder with use of a dangerous weapon in violation of Wis. Stat. §§ 939.39, 940.01, and 939.63. On September 27, 1988, the trial court entered judgment of conviction sentencing Lindh to two consecutive life sentences plus a term of 35 years, 90 days.

AO 72A
(Rev. 8/82)

On July 9, 1992, Lindh filed the instant § 2254 petition, in which he attacks his conviction on grounds that (1) the trial court violated the confrontation clause by precluding cross-examination of the state's psychiatric witness regarding bias, and (2) the trial court erred in failing to suppress inculpatory statements taken during the state's interrogation of Lindh.

Lindh claims to have raised both of these issues on direct appeal before the Wisconsin Court of Appeals and the Wisconsin Supreme Court.

Analysis

A litigant is entitled to commence an action in forma pauperis if (1) he is unable to pay the filing fee, and (2) the action is neither frivolous nor malicious. 28 U.S.C. § 1915(a) and (d). An action is frivolous under § 1915(d) if it alleges clearly baseless facts or lacks an arguable basis in law. Denton v. Hernandez, ____ U.S. ____, 112 S.Ct. 1728, 1733 (1992); Neitzke v. Williams, 490 U.S. 319, 325 (1989). This court takes as true all well-pleaded allegations in this pro se complaint and construes such allegations liberally in favor of the petitioner. See Haines v. Kerner, 404 U.S. 519 (1972) (per curiam).

Rule 4 of the Rules Governing Habeas Corpus Cases Under § 2254 further requires this court to dismiss the petition summarily if "it plainly appears form the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . . ."

Lindh shall be permitted to proceed in forma pauperis on both issues raised in his petition, because both state potential constitutional claims and Lindh claims to have exhausted his available state remedies with respect to both issues. See 28 U.S.C. § 2254(b); Crump v. Lane, 807 F.2d 1394, 1395 (7th Cir. 1986).

IT IS THEREFORE ORDERED that petitioner Aaron Lindh's July 9, 1992 petition to proceed in forma pauperis is GRANTED.

IT IS FURTHER ORDERED that within twenty (30) days from the date of this order respondent James P. Murphy shall answer or otherwise respond to Aaron Lindh's § 2254 petition.

Dated at ~~Milwaukee~~ Door County, Wisconsin, this 24th day of July, 1992.

BY THE COURT:

John W. Reynolds
Senior Judge

APPENDIX B

Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

AARON LINDH,

Petitioner,

v.

JAMES P. MURPHY, Warden

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AFFIDAVIT IN SUPPORT OF
REQUEST TO PROCEED IN FORMA PAUPERIS

State of Wisconsin)
)ss.
County of Columbia)

I, Aaron Lindh, being first duly sworn, depose and say that I am the petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor, and that I believe I am entitled to redress.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes ☒ No ☐

a. If the answer is yes, state the amount of your salary or wages per month, and give the name and address of your employer.

$130.00 per month, employed by Columbia Correctional Institution % CCI P.O. Box 900 PORTAGE, WI. 53901. Prison Labor

b. If the answer is no, state the date of last employment and the amount of salary and wages per month which you received.

2. Have you received within the past twelve months any money from any of the following sources.

a. Business, profession or other form of employment: Yes ☐ No ☒

b. Rent payments, interest or dividends: Yes ☒ No ☐

c. Pensions, annuities or life insurance payments: Yes ☐ No ☒

d. Gifts or inheritances: Yes ☒ No ☐

e. Any other sources: Yes ☐ No ☒

If the answer to any of the above is yes, describe each source of money and state the amount received from each during the past twelve months. Income money on Deposit account approximately almost $10.00.

$100.00

3. Do you own any cash, or do you have money in a checking or savings accounts? Yes ☒ No ☐ (include any funds in prison accounts).

If the answer is yes, state the total value of the items owned. $500.00 in a saving account, $1500.00 in a regular checking account.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes ☐ No ☒ A.L.

If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support. No.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Aaron Lindh

Aaron Lindh

Subscribed and sworn before me
this 27th day of September, 1996

Terri A Koss

Notary Public, State of Wisconsin
My commission expires: 1-16-2000

Respectfully submitted,

James S. Liebman

JAMES S. LIEBMAN*
435 W. 116th St.
Box B-16
New York, NY 10027
(212) 854-3423
*Counsel of record

KEITH A. FINDLEY
Assistant State Public Defender
Office of the State Public Defender
Trial Division
P.O. Box 7884
Madison, WI 53707
(608) 267-5026

RICHARD C. NEUHOFF
600 Harrison St., Suite 535
San Francisco, CA 94107
(415) 543-0433

ATTORNEYS FOR PETITIONER

DATED this 2d day of October, 1996.